# Ayasamy a/l Manikam & Ors v Ladang Holyrood

HIGH COURT (TAIPING) — CIVIL APPEAL NO 11-11 OF 1996
ZULKEFLI J
8 OCTOBER 1999

***Labour Law*** *— Employment — Termination benefits — Application for — Transfer of employees against their will not covered in employment contract —Whether new contract of service would be less favourable than previous — Whether entitled to termination benefits — Employment (Termination and Lay-Off Benefits) Regulations 1980 reg 4*

***Labour Law*** *— Employment — Transfer — Whether employees have to accept transfer if not covered in employment contract — Whether transferbility clause could be inferred*

The appellants were employed as rubber tappers by the respondent and were informed that as the trees in their division would be felled, they were to be transferred to the main division, which was 5 km away. The appellants refused to accept the transfer and requested the respondent to pay termination and lay-off benefits in accordance with reg 4 of the Employment (Termination and Lay-Off Benefits) Regulations 1980 ('the Regulations'). The respondent claimed that the relocation of tapping task was a legitimate right of the management and issued an ultimatum to the appellants. The appellants refused to comply and brought a claim for annual leave, indemnity for payment of wages in lieu of notice and termination benefits to the assistant director of labour who only allowed their claim for annual leave. The appellants appealed claiming that the assistant director did not accept the issue of the appellants' transfer and did not consider the transfer which resulted in the terms and conditions to be less favourable.

**Held,** allowing the appeal with cost:

(1) The assistant director failed to consider whether there was a transfer and as to whether the contract of service covered it. On the facts, the movement of the appellants from one division of an estate to another was a transfer as the two divisions are separate places of employment. The appellants cannot be transferred against their will unless there was a clause in their contract of service allowing the respondent to transfer them. It is therefore incumbent upon the respondent to prove the existence of such a clause. The use of the word 'relocation' by the respondent did not change the fact that in law there was a transfer. The respondent in the circumstances of this case failed to show that there was a clause in the contract of service requiring the appellants to accept the transfer (see p 19B, D–E).

(2) The appellants were protected by s 12(3)(e) of the Employment Act 1955 ('the Act') which clearly suggests that the contract of service must have a provision which required the employee to

accept such transfer before they could be transferred. As such, a clause could not be implied where an employee was expressly protected by statute and the appellants had a statutory right to refuse to go on transfer and in which case the respondent was bound to give them a notice of termination (see pp 19F, 20C–D).

(3) The respondent failed to prove the presence of a transferability clause in the contract of service and was bound to terminate the contract when the appellants refused to accept the transfer. As the respondent had no choice in the matter and as no notice of termination was given, the respondent had to pay indemnity in lieu of notice of termination to the appellants in accordance with s 13(1) of the Act (see p 20G–H).

(4) By failing to take into consideration the financial effect of the transfer, the assistant director failed to arrive at a finding of fact as to whether the transfer would result in financial loss to the appellants when deciding whether or not to allow the claim for termination benefits under the provision of reg 4 of the Regulations. As the transfer resulted in altering the terms and conditions to the appellants' detriment, they were entitled to the termination benefits totalling RM96,040.20 as claimed (see p 24A, H–I).

**[Bahasa Malaysia summary**

Perayu-perayu telah digaji sebagai penoreh getah oleh responden dan telah diberitahu bahawa oleh kerana pokok-pokok di dalam bahagian mereka akan ditebang, mereka akan dipindahkan ke bahagian utama, yang berada 5 km jauhnya. Perayu-perayu enggan menerima pemindahan tersebut dan meminta responden untuk membayar faedah penamatan dan pemberhentian kerja menurut peraturan 4 Peraturan Pekerjaan (Faedah Penamatan dan Pemberhentian Kerja) 1980 ('peraturan tersebut'). Responden mendakwa bahawa penempatan semula tugas menoreh adalah suatu hak yang sah pihak pengurusan dan telah memberikan kata dua kepada perayu-perayu. Perayu-perayu enggan patuh dan telah membawa tuntutan untuk cuti tahunan, tanggung rugi untuk pembayaran gaji sebagai ganti notis dan faedah penamatan kepada penolong pengarah pekerja yang hanya membenarkan tuntutan mereka untuk cuti tahunan. Perayu-perayu telah merayu dan menuntut bahawa penolong pengarah tidak menerima isu pemindahan perayu dan tidak mempertimbangkan pemindahan tersebut yang menyebabkan terma-terma dan syarat-syarat menjadi kurang baik.

**Diputuskan**, membenarkan rayuan dengan kos:

(1) Penolong pengarah tersebut telah gagal untuk mempertimbangkan sama ada terdapat suatu pemindahan dan sama ada kontrak perkhidmatan tersebut meliputinya. Berdasarkan fakta-fakta, pengalihan perayu-perayu daripada satu bahagian estet ke yang

A lain adalah suatu pemindahan oleh kerana dua bahagian adalah tempat kerja yang berasingan. Perayu-perayu tidak boleh dipindahkan di melawan kemahuan mereka kecuali terdapat fasal di dalam kontrak prkhidmatan membenarkan responden untuk memindahkan mereka. Adalah kewajipan responden untuk membuktikan kewujudan fasal sebegitu. Penggunaan perkataan B 'penempatan semula' tidak mengubah fakta bahawa di dalam undang-undang terdapat suatu pemindahan. Responden di dalam keadaan-keadaan kes ini gagal untuk menunjukkan bahawa terdapat suatu fasal di dalam kontrak perkhidmatan yang memerlukan perayu untuk menerima pemindahan tersebut (lihat C ms 19B, D–E).

(2) Perayu-perayu adalah dilindungi oleh s 12(3) Akta Pekerjaan 1955 ('Akta tersebut') yang dengan jelas mencadangkan bahawa kontrak perkhidmatan mestilah mempunyai peruntukan yang memerlukan pekerja untuk menerima pemindahan tersebut sebelum mereka boleh dipindahkan. Oleh itu, suatu fasal tidak D boleh disiratkan di mana pekerja secara nyata dilindungi oleh statut dan perayu-perayu mempunyai hak statutori untuk enggan dipindahkan dan di dalam kes di mana responden diperlukan untuk memberikan mereka notis penamatan (lihat ms 19F, 20C–D).

E (3) Responden telah gagal untuk membuktikan kewujudan fasal pemindahan di dalam kontrak perkhidmatan dan terpaksa menamatkan kontrak apabila perayu-perayu enggan menerima pemindahan tersebut. Oleh kerana responden tidak mempunyai pilihan di dalam perkara tersebut dan oleh kerana tiada notis penamatan diberikan, responden mestilah membayar tanggung F rugi sebagai mengganti notis penamatan kepada perayu-perayu menurut s 13(1) Akta tersebut (lihat ms 20G–H).

(4) Oleh kerana gagal untuk mempertimbangkan kesan kewangan pemindahan tersebut, penolong pengarah gagal untuk mencapai penemuan fakta sama ada pemindahan tersebut akan G mengakibatkan kerugian kewangan kepada perayu-perayu semasa memutuskan sama ada untuk membenarkan tuntutan bagi faedah penamatan di bawah peruntukan peraturan 4 peraturan tersebut. Oleh kerana pemindahan tersebut mengakibatkan pindaan kepada terma-terma dan syarat-syarat sehingga menjejaskan perayu-perayu, mereka berhak kepada faedah penamatan H yang berjumlah RM96,040.20 seperti yang dituntut (lihat ms 24A, H–I).]

## Notes

I For cases on termination benefits see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 877–882.

For cases on transfer, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 987–989.

**Cases referred to**

*Aparau v Iceland Frozen Foods* [1996] IRLR 119 (refd)
*Shalimar Paints Ltd v Third Industrial Tribunal, Calcutta* [1971] 2 LLJ 58 (refd)

**Legislation referred to**

Employment Act 1955 ss 2, 12, (2), (3)(e), 13, (1), 15(2), 70
Employment (Termination and Lay-Off Benefits) Regulations 1980 regs 4, 4(2)(a), (3)

*S Shanker* (*P Kuppusamy & Co*) for the appellants
*Raj Selva* (*Raj Selva & Co*) for the respondent.

*Cur Adv Vult*

**Zulkefli J**:

*The appeal*

This is an appeal by the appellants against part of the decision of Assistant Director of Labour, Taiping ('the assistant director') dated 13 January 1996. The assistant director in his decision allowed only the appellants' claim for annual leave pay but dismissed the appellants' claim of indemnity for payment of wages in lieu of notice and termination benefits. The said decision of the assistant director was made under an inquiry held in accordance with the provision of s 70 of the Employment Act 1955 ('the Act') arising from a complaint made by the appellants against their employer, the respondent for effecting their transfer as regards their place of work as rubber tappers from the Bukit Rhona Division Estate to the Main Division Estate.

*The facts of the case*

The relevant facts of this case are as follows:

The appellants were employed as rubber tappers by the respondent, Ladang Holyrood. There were at the material time two divisions at Ladang Holyrood, namely the Main Division Estate and the Bukit Rhona Division Estate. By way of a letter dated 18 June 1994 the appellants were informed by the respondent that the rubber trees in the Bukit Rhona Division would soon be felled, and therefore the appellants were ordered to be transferred to the Main Division with effect from 1 July 1994. The appellants refused to accept the transfer and by way of a letter dated 27 June 1994 requested the respondent to make arrangement to pay termination and lay-off benefits to the appellants in accordance with the Employment (Termination and Lay-Off Benefits) Regulations 1980. By way of a letter dated 30 June 1994 the respondent informed the appellants that if the appellants failed to conform to the transfer order the respondent would be forced to exercise various options open to them including the possibility of invoking s 15(2) of the Act whereby the appellants shall be deemed to have broken their

A contract of service with the respondent. The respondent also claimed that the relocation of tapping tasks was a legitimate right of the management. By way of a letter dated 16 July 1994 the respondent instructed the appellants to report for work on or before 20 July 1994 failing which the respondent would deem that the appellants have abandoned their employment. The appellants refused to comply with the order. Thereafter the appellants B brought a claim against the respondent before the assistant director in terms of payments specified as follows:

| | | |
|---|---|---|
| (i) | Annual Leave Pay | — RM 1,773.59 |
| (ii) | Indemnity for payment of wages in lieu of notice | — RM 12,379.20 |
| (iii) | Termination benefits | — RM 96,040.20 |
| | | RM110,192.99 |

D After hearing the evidence of witnesses from both parties the assistant director dismissed the claims with regard to termination benefits and indemnity for payment of wages in lieu of notice.

*The issues*

E The main issues to be decided before the assistant director as I see it are as follows:

(1) Whether the letter dated 18 June 1994 issued by the respondent to the appellants was in fact a direction of transfer to a new place of employment and not a direction as to relocation of duties or tapping tasks.

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(2) Whether in the absence of a specific provision in the contract of service entered into between the appellants and the respondent which requires the appellants to accept a direction of transfer to a new place of employment, the appellants as employees on a refusal to accept such a transfer are entitled to receive a notice of termination of service G from the respondent and the respondent as the employer is required to give the said notice of termination of service in accordance with the provision of s 12(3)(e) of the Act.

(3) Whether on the failure on the part of the respondent to give to the appellants the said notice of termination of service it can be deemed that the respondent as the employer had terminated the contract of H service of the appellants and by virtue of the provision of s 13 of the Act the respondent is required to pay to the appellants an indemnity in the form of wages in lieu of notice.

(4) Whether in the event that the respondent is deemed to have terminated the contract of service of the appellants it follows that the I appellants are entitled to receive termination benefits under the provision of reg 4 of the Employment (Termination And Lay-Off Benefits) Regulations 1980.

*The findings*

Having studied the appeal record and having heard the submission of both learned counsels for the appellants and the respondent, it is my finding that the assistant director who tried this case had erred in law and in fact in arriving at the decision of dismissing the appellants claim of indemnity for payment of wages in lieu of notice and termination benefits. It is my view that the assistant director in arriving at his decision did not give proper consideration to relevant matters placed before him. For example, at p 24 of the appeal record the assistant director in his grounds of judgment inter alia had stated as follows:

> Alasan ketiga iaitu non transferability clause di dalam kontrak pekerjaan yang dikemukakan oleh pengadu tak dapat saya terima kerana dalam perkara ini ianya hanya melibatkan jarak perjalanan yang pendek yang melibatkan masa kurang dari 15 minit. Pengadu-pengadu telah diberikan pilihan oleh defendan sama ada terus kekal di perumahan Bahagian Bukit Rhona ataupun memilih untuk ditempatkan di perumahan pekerja Bahagian Utama; bagi yang ingin kekal di Bukit Rhona pengangkutan berulang-alik ke tempat kerja akan disediakan oleh pihak defendan.

With respect, the questions that the assistant director should have considered in my view are not whether the transfer is to a place only 15 minutes away and not whether housing accommodation or transport are being provided for. The questions that he should have considered are as follows:

(i) Is there a transfer?

(ii) Is there a clause in the contract of service requiring the appellants to accept the transfer?

(iii) If there is no specific clause requiring the appellants to accept the transfer could a term to that effect be implied?

(iv) What is the effect of the provision of s 12(3)(e) of the Act?

As to the question of whether there is a transfer it is necessary to ascertain the true meaning of the term 'transfer' in the context of employer-employee relationship under the Act. The legislature in its wisdom has not defined the term 'transfer' under the Act leaving it to the court to determine its meaning in the context of the matters that come before the court. In the case of *Shalimar Paints Ltd v Third Industrial Tribunal, Calcutta* [1971] 2 LLJ 58, TK Basu J in delivering the judgment of the High Court, Calcutta had this to say on the term 'transfer':

> The expression 'transfer' in my opinion connotes that an employer has more than one place of business, and the employee is called upon to work in a different place of business from the one in which he worked previously.
>
> Therefore it is my view that where the employer has more than one place of business, or as in the present case more than one division, each place of work or division is a different place of business and a movement from one to another is a transfer. A reference to the provision of s 12(3)(e) of the Act showed that in relation to the term 'transfer' it had amongst

A others used the following words, '... transfer to any other place of employment ...'. The term 'place of employment' on the other hand is defined under s 2 of the Act as follows:

> Any place where work is carried on for an employer by an employee.

B Taking into consideration the abovementioned relevant provisions of the Act and reading them together in the context of the expression 'transfer' as given in the case of *Shalimar Paints Ltd v Third Industrial Tribunal, Calcutta* I am of the view that the movement of rubber tappers from one division of an estate to another as in the present case is a transfer as the two divisions are separate places of employment. It is an undisputed fact that the two C divisions are at least 5 km apart. It is to be noted that one of the appellants, Ayasamy had testified that in the 22 years he had been under the employment of the respondent there had been no transfer of employees between the Main Division and the Bukit Rhona Division. This shows that the two divisions, albeit belonging to the same owner, were different places of employment.

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It is my view that the appellants cannot be transferred against their will unless there is a clause in their contract of service allowing the respondent to transfer them. It is therefore incumbent upon the respondent to prove the existence of such a clause. The use of the word 'relocation' by the respondent to my mind does not change the fact that in law there was a E transfer. The respondent in the circumstances of this case has failed to show that there is a clause in the contract of service requiring the appellants to accept the transfer.

The respondent might have contended that every employer has an inherent right to transfer his employees and a transferability clause may be F implied into the contract of service. However it must be stressed here that the appellants are protected by the specific provision of the Act as spelt out under s 12(3)(e) of the Act which clearly suggests that the contract of service must have a provision which requires the employee to accept such transfer before he can be transferred. Even at common Law the courts have been slow to imply a transferability clause where none is expressed. In the G case of *Aparau v Iceland Frozen Foods* [1996] IRLR 119, which is a decision of the Employment Appeal Tribunal, the court on this point had this to say at p 120:

> The industrial tribunal had also erred in holding that if its conclusion that there was an express contractual mobility clause was wrong it was necessary H to imply such a term.
>
> Although there must necessarily be some term as to place of employment in a contract of employment, there was no necessity to have any clause about mobility in the employee's contract. The nature of her work did not make such a clause necessary, nor was it needed in order to give the contract business efficacy. Whilst it is an advantage to employers of assisting I in large chains of stores to be able to move employees around, there are other ways of dealing with the necessary flexibility of employment without having resort to a compulsory right to transfer.

If there was wrong and some term as to mobility must be implied in every contract of employment, there was no basis for implying a term entitling the employers to transfer the employee against her will. A mobility clause need not always give the employer the right to move the employee. It may simply state that the employee is entitled to remain at the particular work place. Even assuming, as the employers contended, that the correct test was that set out in *Courtaulds Northern Spining Ltd v Sibson*, ie what the parties would probably have agreed if they were being reasonable, there was no ground for supposing that, in the present case, both parties would have agreed that such a term should give the employers the right to move the employee against her will.

The appeal on this point would also be allowed and a finding that there was no implied term entitling the employers to transfer the employee at will would be substituted for the decision of the tribunal.

Having noted the fact that even at common law courts are strict in finding an implied transferability clause, I am of the view that such a clause cannot be implied where an employee is expressly protected by statute. In the present case it is my finding that the appellants have a statutory right to refuse to go on transfer in which case the respondent is bound to give them a notice of termination. By virtue of the provision of s 12 of the Act either party to a contract of service may give to the other party notice of intention to terminate the contract, the notice period being as enumerated in s 12(2). Section 12(3)(e) of the Act however provides as follows:

(3) Notwithstanding anything contained in sub-s (2) where the termination of service of the employee is attributable wholly or mainly to the fact that — ...

(e) the employee has refused to accept his transfer to any other place of employment, unless his contract of service requires him to accept such transfer, or ...

the employee shall be entitled to, and the employer shall give to the employee, notice of termination of service, and the length of such notice shall be not less than that provided under sub-s (2)(a), (b) or (c), as the case may be, regardless of anything to the contrary contained in the contract of service.

It is clear from the provision of the above stated s 12(3)(e) of the Act, the employer must give a notice of termination where the employee has refused to accept his transfer to any other place of employment unless his contract of service requires him to do so. In this case as earlier stated the respondent as the employer has failed to prove the presence of a transferability clause in the contract of service. Therefore the respondent as the employer is bound to terminate the contract when the appellants as the employees refuse to accept the order of transfer. The respondent has no choice in the matter. It further follows in the event that no notice of termination is given, the respondent as the employer in the present case must pay an indemnity to the appellants as employees in accordance with the provision of s 13(1) of the Act which states as follows:

Either party to a contract of service may terminate such contract of service without notice or, if notice has already been given in accordance with s 12, without waiting for the expiry of that notice by paying to the other party an indemnity of a sum equal to the amount of wages which would have accrued

A to the employee during the term of such notice or during the unexpired term of such notice.

It is also pertinent to note of the findings made by the assistant director as regards the appellants' claim as stated by him at p 25 of the appeal record as follows:

B

> Adalah jelas kepada saya tentang sikap dan niat pengadu-pengadu. Mereka menggunakan alasan-alasan penolakan arahan tersebut semata-mata untuk mendapatkan faedah penamatan, gaji gantian notis dan lain-lain ganjaran kerana masing-masing telah menghampiri umur persaraan.

With respect to the said assistant director's findings no evidence was ever C tendered to show when any of the 17 appellants were due for retirement. In fact a document tendered as encl 'A' at p 2 of the additional appeal record showed that all the appellants had been working for different period of time. The longest term one of them had served the respondent was from 1960, and the shortest term from 1989, with many others in between. How can the assistant director arrive at a finding that all of them were nearing D retirement age? The finding is therefore perverse as it is without any evidential basis.

It is also noted that the assistant director had arrived at a finding as stated in his grounds of judgment that the respondent had acted in good faith in ordering the transfer. With respect this, is not an issue on this E matter. The Act does not state anything about good faith or the lack of it. I am of the view that in order for the appellants to succeed in their claim they do not have to prove that the respondent acted in bad faith. All the appellants have to do in order to succeed in their claim is that they were ordered to go on transfer in the absence of a transferability clause. Having considered the evidence adduced as a whole before the assistant director, it F is my finding that the appellants are entitled to the claim of a sum of RM12,379.20, being indemnity for wages in lieu of notice on the ground that there has been a failure on the part respondent to give to the appellants a notice of termination of service resulting in the termination of the contract of service of the appellants.

G I shall now deal with the appellants entitlement of termination benefits under reg 4 of the Employment (Termination and Lay-Off Benefits) Regulations 1980 ('the Regulations'). The relevant provisions of the Regulations are regs 4(2) and 4(3). Regulation 4(2)(a) of the Regulations inter alia states that an employee is not entitled to termination benefits if his contract is immediately renewed or he is re-engaged under a new contract H of service under term and condition which are not less favourable. Regulation 4(3) of the Regulations on the other hand states as follows:

> (3) An employee shall not be entitled to any termination benefits payment, if, not less than 7 days before the date with effect from which his services are to be terminated, the employer has offered to renew his contract of I service or to re-engage him under a new contract, so that —
>
> (a) the provisions of the contract as renewed, or of the new contract, as the case may be, as to the capacity and place in which he would be

employed, and as to the other terms and conditions of his employment, would not be less favourable than the corresponding provision of the contract as in force immediately before the termination of his service; and

(b) the renewal or re-engagement would effect on or before the date with effect from which his services are to be terminated, and the employee has unreasonably refused that offer.

Therefore based on the provisions of regs 4(2) and 4(3) of the said Regulations, I am of the view that the appellants would be entitled to termination benefits if:

(i) they have not been re-engaged under terms and conditions which are not less favourable than previous terms;

(ii) they have not been offered a new contract of service with terms and conditions which are not less favourable with regard to the place of work.

For the present case, reg 4(3) of the Regulations is the relevant provision as the new place of employment offered at the main division was refused by the appellants. There was no actual renewal of the contract as the appellants did not accept the new contract. Therefore, reg 4(2) of the Regulations does not come into play. As the appellants refusal was not unreasonable, the appellants are entitled to the termination benefits as provided for in the Regulations. The facts of the appellants case clearly show that the new contract of service offered by the respondent for the appellants to work in the main division is less favourable in terms and conditions as follows:

(i) there would be a loss of income due to the transfer.

(ii) no proper transport, if any, was provided by the respondent.

As to the loss of income due to the transfer there is evidence to show that the transfer would entail a loss of income. This is due to the fact that the fields in the Main Division were planted with older trees than at Bukit Rhona Division. These older trees would produce lower yields in latex than younger trees. Mr Ayasamy, one of the appellants in his evidence on this point had stated as follows:

> Saya bersetuju terdapat pokok-pokok tua di main division seperti di kawasan 70, 71, 72. Saya bersetuju bahawa hasil torehan di main division jauh berkurangan dan ini melibatkan kurangan pendapatan kami.

One of the respondent's witness in his evidence before the assistant director in relation to the effect of the transfer in fact had this to say:

> ... ketika itu saya ada penoreh getah di Bahagian Bukit Rhona seramai 17 orang termasuk mandur. Saya tidak menetapkan torehan di main division semasa D1 dikeluarkan di Field 70, 71 dan 72 yang mana adalah lebih tua dari Field 75 di Bahagian Bukit Rhona. (D1 is the letter of transfer dated is 18 June 1994.)

It is also noted that the respondent did not produce any documentary evidence to negate the allegation of loss of income. Surely the respondent

must have records of the yield or production levels or even the earnings of its tappers in the main division. None of these documents were tendered as evidence before the assistant director. The assistant director did not make any adverse inference against the respondent for the non-production of those records. Neither did the assistant director take into consideration Mr Ayasamy's testimony. Instead, what the assistant director did was to state on this issue of loss of income as a result of the transfer as follows:

> Alasan kedua adalah low yielding di fields bahagian utama yang diberikan oleh pihak pengadu juga tidak dapat diterima kerana issue ini tak seharusnya dibangkitkan sebagai alasan penolakan arahan penempatan semula kerana ianya telah jelas diperihalkan di dalam perjanjian bersama (Industrial Court Award No 92/90).

It is clear from the above statement the assistant director did not even consider the issue of loss of income. Instead the assistant director had stated that the question of low yielding fields cannot be a basis of a refusal to go on transfer because this matter is covered by the Industrial Court Award No 92/90 which binds the appellants and the respondents. With respect, the assistant director has failed to point out to which article he refers to in the Industrial Court Award No 92/90. The said award which can be found at p 18 of the additional appeal record is silent on the question of transfers that cause a loss of income to the tappers. The assistant director has therefore not taken into account the relevant matters that were before him. Instead he has taken into account irrelevant matters that were not in evidence before him.

At this juncture on the issue of loss of income as a result of the transfer, I would refer to a relevant authority in the case of *Kumpulan Guthrie Sdn Bhd v Valaithan a/l Raman Nair & Ors* [1990] 1 MLJ 294, wherein his Lordship LC Vohrah J in dealing with the grounds of judgment delivered by the assistant director of labour in that case had this to say at p 295:

> ... she did direct her attention to reg 4 and found for a fact that the complainants were justified in rejecting the offer of a new employment in Ladang Sembrong or Ladang Tun Dr Ismail situated 40 to 60 miles away from Ladang Lambak Elaeis as acceptance would have meant the uprooting of family life. She also found for a fact that had they accepted the offer to stay on at Ladang Lambak Elaeis to work as general workers they would have earned much less than what they were earning as rubber tappers as was obvious from the comparative wage tables. What was therefore uppermost on her mind was the question as to whether the new contact of employment was in terms and conditions less favourable than those on which they were previously employed and it was obvious from the record that she found for a fact that the new terms and conditions were less favourable and that the complainants were accordingly entitled to reject their new employment and that therefore termination benefits were payable.

However in the present case it is noted that in his grounds of judgment the assistant director has failed to give any consideration to the provision of reg 4 of the Employment (Termination and Lay-Off Benefits) Regulation 1980. He has failed to make a finding of fact as to whether or not the

transfer would result in terms and conditions which were less favourable to the appellants. In this case therefore the assistant director has clearly erred in law. By failing to take into consideration the financial effect of the transfer the assistant director has failed to arrive at a finding of fact as to whether the transfer would result in financial loss to the appellants.

It is also my finding that the assistant director has failed to take into account the fact that the respondent was unable to provide suitable transport facilities to commute to the main division estate. At p 12 of the appeal record Ayasamy, one of the appellants testified as follows:

> Saya bertanya sama ada pengangkutan disediakan untuk pekerja-pekerja bagi bertugas di tempat baru, diberitahu pengangkutan tidak disediakan.

The respondent's second witness Isa bin Tumin testified that he had considered providing transport, but at p 20 of the appeal record he had stated as follows:

> Transport arrangement adalah idea dan keputusan saya sendiri yang dibuat pada perjumpaan tersebut iaitu pada 29 June 1994. Pada ketika itu saya hanya terfikirkan mode of transport yang boleh disediakan hanyalah kenderaan ladang yakni Tractor with trailer (AAN 6605). Saya tak tahu sama ada kenderaan ini pernah ditahan polis dan didenda kerana tiada permit. Tiada permit untuk bawa penumpang dalam hal kenderaan ini tapi ada Roadtax.

Based on the above statement it is evident that at the time of transfer the respondent could not provide a suitable and safe transport to the appellants to travel from Bukit Rhona to the main division. The so-called transport that was contemplated by the respondent's second witness did not even have a permit to transport passengers.

Furthermore the respondent's first witness, Zahari bin Mohd Nusi had testified as at p 18 of the appeal record as follows:

> Saya setuju jika pengangkutan disediakan, pengadu-pengadu terpaksa sampai di tempat kerja pada waktu yang telah biasa dipraktiskan di Main Division. Perjalanan dari Bukit Rhona ke Main Division pergi balik mengambil masa lebih kurang 20 minit.

I am of the view that from the above statement this would mean that the appellants' working hours would have been extended to accommodate the extra travelling time. Surely this tantamount to altering the terms and conditions of employment to the appellants' detriment. Working longer hours for the same salary is itself a less favourable term. In the present case, 20 minutes of extra working hours a day would mean two extra hours a week. In the circumstances of this case, it is my view that the assistant director has failed to take all the relevant matters into consideration when deciding whether or not to allow the claim for termination benefits under the provision of reg 4 of the Employment (Termination and Lay-Off Benefits) Regulations 1980. It is my finding that the appellants in this case are therefore entitled to the termination benefits totalling RM96,040.20 as claimed.

A For the above stated reasons, it is my view and conclusion that the assistant director had failed to address the real issues before him correctly. The appeal is accordingly allowed with costs.

*Appeal allowed with costs.*

B Reported by Chin En Tek

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